

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CACR05-70

MAY 10, 2006

TARIO WATKINS
APPELLANT

APPEAL FROM THE UNION COUNTY
CIRCUIT COURT
[NO. CR2003-183-1]

V.

HON. HAMILTON H. SINGLETON,
JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED; MOTION GRANTED

This is the second time that this no-merit appeal is before us. The pertinent facts are as follows. Appellant Tario Watkins was convicted of possession of a controlled substance on June 23, 2003, and was placed on five years' probation. On December 10, 2003, the State filed a petition to revoke Watkins's probation based on his alleged possession of cocaine. Following a revocation hearing, the trial court granted the State's petition to revoke Watkins's probation and sentenced Watkins to ten years in prison. Watkins's counsel subsequently filed a motion to withdraw on the grounds that the appeal of the trial court's decision to revoke Watkins's probation was without merit. The motion was accompanied by a brief that purportedly discussed all matters in the record that might arguably support an

appeal, and a statement as to why counsel considered the points raised as incapable of supporting a meritorious appeal.

In a previous unpublished opinion, *Watkins v. State*, CACR 05-70 (Jan. 11, 2006), we ordered rebriefing because Watkins's counsel submitted a brief that did not contain any discussion of the trial court's denial of a motion to suppress. Watkins's counsel has now filed a substituted brief in which he has satisfactorily explained that he did not discuss the denial of appellant's motion to suppress in his original brief because it was not a motion that was filed in the revocation case; rather, it was a motion filed in an underlying cocaine possession case then pending against the appellant that, for purposes of judicial economy, was heard simultaneously with the revocation petition. As counsel notes, the court's denial of the motion to suppress in the underlying cocaine possession case was immaterial to the court's decision in the probation revocation case that is the subject of this appeal. Therefore, we are satisfied that counsel's substituted brief, filed pursuant to *Anders v. California*, 386 U.S.738 (1967), and Arkansas Supreme Court Rule 4-3(j)(1), and alleging that an appeal would be wholly frivolous, refers to everything in the record that might arguably support an appeal, and explains why each adverse ruling in this case is not a meritorious ground for reversal. Watkins has filed pro se points of appeal and the State has filed a brief in response. We affirm the trial court's decision to revoke Watkins's probation and now grant counsel's motion to withdraw.

In *Ofochebe v. State*, 40 Ark. App. 92, 93, 844 S.W.2d 373, 374 (1992), this court stated as follows:

The procedure for the filing of a no-merit brief is governed by *Anders v. California*, 386 U.S. 738 (1967) and Rule 11(h) [now Rule 4-3(j)] of the Rules of the Supreme Court. The test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be “wholly frivolous.” *Anders*, 386 U.S. at 744. Under *Anders*, the appellate court is also required to make a determination “after a full examination of all the proceedings,” whether the case is wholly frivolous. Similarly, Rule 11(h) [now Rule 4-3(j)] permits the filing of a no-merit brief only when “the appeal is wholly without merit.”

After examining the adverse rulings addressed by counsel and Watkins’s pro se arguments, we hold that an appeal from any of the adverse rulings or the points raised by Watkins would be wholly frivolous.

I. *Adverse Rulings*

Watkins’s counsel asserts that the only adverse ruling in this case was the trial court’s decision to grant the State’s revocation petition. To revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of probation or suspended sentence by a preponderance of the evidence. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). On appellate review, the trial court’s findings will be upheld unless they are clearly against a preponderance of the evidence. *Id.* Because determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial judge’s superior position in that regard. *Id.*

In this case, Watkins was prohibited from possessing “any controlled substance” as a condition of his probation. During the hearing on the petition to revoke, Officer Randall

Gilbert of the El Dorado Police Department testified that he found Watkins to be in possession of approximately twenty-four grams of crack cocaine on August 5, 2003. Although Watkins denied that Officer Gilbert “retrieved” any drugs from him on that date, the trial judge was free to determine the credibility of the witnesses. We therefore hold that an appeal of the trial court’s decision to grant the State’s petition to revoke would be wholly frivolous.

II. *Watkins’s Pro Se Points*

Watkins’s pro se points can be classified into three categories as follows: (1) ineffective assistance of counsel; (2) sufficiency of the evidence; and (3) suppression of the evidence. As we have already addressed the sufficiency of the evidence above, we will address only two of these three points.

Ineffective Assistance of Counsel

Watkins first claims that his attorney “did not work in [Watkins’s] best interest” and that he (Watkins) was convicted based upon his attorney’s “lack of knowledge of the law.” Watkins further asserts that his attorney was “reluctant” to file a motion to suppress and did so only after Watkins begged “for months.” Watkins’s ineffective-assistance-of-counsel argument was not raised below, and we will generally not consider errors raised for the first time on appeal. *Cook v. State*, 76 Ark. App. 447, 68 S.W.3d 308 (2002). Thus, we will not address the merits of this argument.

Suppression of the Evidence

Watkins also contends that the search and seizure conducted by Officer Gilbert in this case was illegal, and, thus, the evidence seized by Gilbert should not have been admitted. Watkins apparently claims that the trial court should therefore have granted his motion to suppress. As previously noted in this opinion, Watkins's motion to suppress was part of a separate case. Thus, the issue cannot be reached on appeal of this case.

For the reasons discussed herein, counsel's motion to be relieved is now granted and the trial court's decision to revoke Watkins's probation is affirmed.

Affirmed; motion granted.

GLOVER and CRABTREE, JJ., agree.